No. 16,170

United States Court of Appeals

For the Ninth Circuit

GLADYS LAYCOCK,
Appellant,

vs.

FRANK J. KENNEY,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S SUPPLEMENTAL BRIEF AS REQUESTED BY THE COURT.

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The order of this Court required supplemental briefs dealing with two questions stated. To brief either of those questions requires a statement of the essential facts.

THE ESSENTIAL FACTS.

The appellant alleges a patent from the government which granted to her a vested right to possess and use the gold on the patented claim. The appellee seeks to enforce regulations which invade that private right. Those regulations, under threat of arrest, prosecution

and fine prohibit the appellant from producing, owning or using her gold except under a license. The license requires her to surrender her gold at a price set by the regulations, which price is below the cost of production.

The complaint alleges that no statute of the United States sets a price for gold, and that Congress has not and could not delegate the power to set the price for gold.

Accordingly the complaint alleges the regulations to be:

(a) Unwarranted by any law;

(b) Contrary to any constitutional power, and

(c) That the regulations violate appellant's constitutional rights.

The action seeks to restrain the defendant from action, which is unauthorized by any valid law or regulation. The relief sought is against the offending officer. The decree sought will expend itself on the official who is before the Court. If he be enjoined as prayed, the matter is at an end; that is all the relief which appellant seeks.

Appellant does not seek to impose any liability upon the government; she seeks no recovery from the government; she does not ask that the government be required to buy her gold or be required to do anything. The appellant seeks only to be let alone—so that she may produce and use the gold which was granted to her by the patent from the government. *This suit challenges the authority to do the thing complained of.*

Therefore, THIS IS NOT A SUIT AGAINST THE GOVERNMENT.

When a suit challenges the authority to do the thing complained of "it is not a suit against the United States".

Hynes v. Grimes Packing Co., 337 U.S. 86 at 96;
Larson v. Domestic and Foreign Corporation, 337 U.S. 682 at 704;
Land v. Dollar, 330 U.S. 331;
Colorado v. Toll, 268 U.S. 228;
Philadelphia Co. v. Stimson, 223 U.S. 605 at 620;
Pennoyer v. McConnaughly, 140 U.S. 10;
United States v. Lee, 106 U.S. 196;
Osborne v. Bank of the United States, 9 Wheaton 738.

Those decisions specifically hold that a suit to restrain one who claims to act as an officer of the government under color of an unconstitutional statute is not a suit against the government.

In the *Pennoyer* decision the Court followed and quoted from *Osborne v. Bank of the United States* as follows:

> "The case may then be said to have fully established the doctrine that an officer of the state may be enjoined from executing a statute of the state, which is in conflict with the constitution of the United States, when such execution would violate the rights and privileges of the complainant".

Where an officer attempts to enforce an order, the effect of which will be to wrongfully deprive a party of vested rights acquired under Acts of Congress, such suit is not a "suit against the United States" and may be maintained without the presence of the United States.

Ickes v. Fox, 300 U.S. 82 at 96.

The situation there outlined is the identical situation present in this case. Under the patent granted by the United States under an Act of Congress, the plaintiff acquired vested property rights. The defendant attempts wrongfully to interfere with those property rights. Hence the action is not a suit against the United States.

A public official becomes a tort-feasor when he exceeds the limit of his authority. If, in excess of his authority, such an official seizes or injures the property rights of the citizen, that citizen is not relegated to the Court of Claims to recover a money judgment.

> "The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."
>
> 330 U.S. 738.

Under such uniform decisions the plaintiff's action here is not a suit against the government. To constitute a suit against the government a suit must seek some financial recovery against the government such as described in *Mine Safety Co. v. Forrestal,* 326 U.S. at 371, where the Court said

That the government's liability for money cannot be tried "behind its back".

In *Hynes v. Grimes Packing Co.,* 337 U.S. at 96 the Court described the proper test as, whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the Court". Such is the situation here. The decree asked will be effective by expending itself on the defendant who is before the Court. It will not establish any right of recovery as against the government or require the government to do anything. It does not ask any money judgment against the government, and does not request any positive action by the government.

The Courts have also said that a suit is not a suit against the government unless it seeks some recovery from the public treasury or "it interfere with the public administration".

Land v. Dollar, 330 U.S. at 738, citing *ex parte New York,* 256 U.S. 490.

But *ex parte New York* carefully distinguishes a suit brought against an officer acting under the color of an unconstitutional statute and specifically holds that such a suit is not an action against the government. Furthermore, the phrase "interfere with the public administration" has a specific and limited meaning under *Morrison v. Work,* 266 U.S. 481.

In that case the Indian property was controlled by the United States as guardian for the Indians. The

Court showed that the lands were the property of the United States which had power to dispose of them.

The opinion then said that "to interfere with the management and disposition of the lands by the United States by enjoining its officials would interfere with the performance of governmental functions." (Page 485.) But such is not the instant case.

Here the property which the appellant seeks to protect is her own property, not the property of the United States, and the government has no power of management or administration over that property.

We submit that under the settled law the instant case is not a suit against the United States.

The matter is summed up in one sentence by the Courts of Appeals both for the Fourth Circuit and for the District of Columbia as follows:

> "Where the authority to do the particular act has not been conferred, or constitutional power to confer it is lacking, the suit is not subject to the objection that it is against the United States".
>
> *Krug v. Fox,* 161 Fed. (2d) 1013;
>
> *Ainsworth v. Barn Co.,* 157 Fed. (2d) 101.

NO OFFICIAL OR AGENCY OF THE UNITED STATES WHO IS NOT NAMED AS A PARTY HEREIN IS AN INDISPENSABLE PARTY TO THIS ACTION.

The complaint seeks only to enjoin the defendant from acting under regulations which the complaint alleges to be beyond any authority conferred by acts

of Congress, and beyond the authority of Congress itself.

The decree sought will not require any other official or government agency to take any action whatsoever. The decree sought will only enjoin the defendant from interfering with the plaintiff in her business—that is to be let alone.

The decisions sustain the right of a citizen to enjoin a public official, who invades a private right by exceeding his authority or by carrying out a mandate of his superior. Such injunction will be granted without joining his superior or any other party.

Williams v. Fanning, 332 U.S. 490;
Hynes v. Grimes Packing Co., 337 U.S. 86;
Ickes v. Fox, 300 U.S. 82.

Those decisions in and of themselves control this case.

It must be noted that in those cases there was no allegation that the defendant was acting without constitutional authority. Those opinions held that an injunction should issue to protect property rights against unwarranted interference by a subordinate official, without joining his superior or any other party or agency.

The uniform decisions hold that when a subordinate official invades private rights by acting under an unconstitutional statute or regulation, such official will be enjoined, and that no other party or agency is an indispensable party to the proceeding.

Colorado v. Toll, 268 U.S. 228;
Philadelphia v. Stimson, 223 U.S. 605 at 620;

Larsen v. Domestic and Foreign Corporation,
337 U.S. 682 at 690 and 704;
United States v. Lee, 106 U.S. 196.

This Court itself has uniformly sustained the right to maintain an action against a subordinate official, when the complaint alleged that such officer was acting under regulations issued by a superior, which were beyond the powers delegated to him.

In *Neher v. Harwood,* 128 Fed. (2d) 846 this Court quoted from and has uniformly followed the ruling in the *Toll* case which said:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States".
>
> 268 U.S. 230;

See also

Berdie v. Kurtz, 75 Fed. (2d) 898.

This Court carefully distinguished two different situations:

(1) Where the superior officer is without authority to act, his attempt to do so is invalid and the subordinate may be restrained without joining his superior. This Court so holds.

(2) Where the superior officer has acted under a valid statute, but has abused his discretion, such superior officer should be joined in an action against the subordinate. This Court has so held.

The last decision of this Court is

Williams v. Fanning, 158 Fed. (2d) 95

decided in December 1946. That decision rested upon this Court's decision in

Neher v. Harwood, 128 Fed. (2d) 846.

Subsequently and in 1957 the Supreme Court ruled in

Williams v. Fanning, 332 U.S. 490,

that when a subordinate official invades a private right by carrying out a mandate of his superior, a suit to enjoin such subordinate may be maintained against the subordinate alone, without joining his superior or any other party.

The Court held that such a suit may be maintained if the decree to be entered will effectively grant the relief prayed by expending itself on the subordinate official who is before the Court by causing him to desist from the unwarranted interference with a private right.

The *Fanning* opinion was followed in

Hynes v. Grimes Packing Co., 337 U.S. 86.

At page 97 the Court showed that the plaintiffs merely sought an injunction to restrain the subordinate officer from interfering with their business (fishing); that the plaintiffs did not seek affirmative action by the subordinate, and that if he were enjoined the plaintiffs would have received all the relief they sought. The Court held that such issue could be settled by a decree between the parties "without having the Secretary * * * as a party to the litigation". (Page 97.)

Such is the precise situation in the instant case. The appellant seeks only a decree to enjoin the appellee from interfering with her business and her property. She seeks merely to be let alone. She does not ask that the appellee be required to take any affirmative action. The issue is her right to be let alone in her business without interference by the appellee. That issue can be settled by a decree between the parties.

We submit, therefore, that the defendant is the only necessary party to this action and that there is no other indispensable party.

Dated, May 14, 1959.

Respectfully submitted,

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